DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. VOA II, L.L.C. and LAWRENCE IKE AGBU Respondents	Case Nos.: I-00-10722 I-00-10736

FINAL ORDER

I. Introduction

On November 21, 2001, the Government served a Notice of Infraction upon Respondents VOA II, L.L.C. ("VOA II") and Lawrence Ike Agbu, alleging that they violated various watershed protection rules. The Notice of Infraction charged that Respondents violated 21 DCMR 502.1 by failing to obtain a permit before engaging in land disturbing activities; 21 DCMR 506.2 by failing to comply with an approved erosion and sedimentation plan; 21 DCMR 538.1(f) by failing to protect stockpiled soil with mulch or temporary vegetation; and 21 DCMR 539.4 by failing to have adequate erosion control measures in place before and during exposure. The Notice of Infraction alleged that the violations occurred on October 31, 2001 at 826 48th Place, N.E. It sought total fines of $800 – $500 for the alleged violation of § 502.1, and separate fines of $100 each for the alleged violations of §§ 506.2, 538.1(f) and 539.4.

Respondents did not file an answer to the Notice of Infraction within the required 20 days after service (15 days plus 5 additional days for service by mail pursuant to D.C. Official Code §§ 2-1802.02(e), 2-1802.05). Accordingly, on December 21, 2001, this administrative court

issued an order finding Respondents in default and subject to the statutory penalty of $800 required by D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). The order also required the Government to serve a second Notice of Infraction.

The Government served the second Notice of Infraction on January 2, 2002. On that same day, Respondents filed an untimely answer to the first Notice of Infraction with a plea of Deny. I held an evidentiary hearing on February 21, 2002. Carlos Fields, the inspector who issued the Notices of Infraction, appeared on behalf of the Government. Respondent Lawrence Ike Agbu, the managing partner of Respondent VOA II, appeared on his own behalf and on behalf of VOA II. At the hearing, Mr. Akbu moved to change Respondents' pleas to the §§ 506.2, 538.1(f) and 539.4 violations to Admit with Explanation, and I granted that motion. Based upon the testimony of the witnesses, my evaluation of their credibility, and the exhibits admitted into evidence, I now make the following findings of fact and conclusions of law.

III. Findings of Fact

On October 31, 2001, Respondents were constructing a single-family home at 826 48th Place, N.E. Respondents had obtained a building permit authorizing construction of the house. Petitioner's Exhibit ("PX") 102. Mr. Fields visited the site on October 31, 2002. On that day, the foundation already had been poured and the house was framed.

Before construction began, a subcontractor hired by Respondents had demolished a building that previously stood on the site. The evidence is insufficient to establish the precise date of the demolition. VOA II purchased the property in June 2001, however, and the parties agree that the demolition occurred before the purchase. Thus, the demolition occurred at least

three months before October 31, 2001, the date listed on the Notices of Infraction. No building permit authorized demolition of the building.

Respondents' plea of Admit with Explanation establishes that they failed to comply with an approved erosion and sedimentation plan for the property, that they failed to stabilize and cover stockpiled soil with mulch or temporary vegetation, and that they failed to have adequate erosion controls in place before and during the exposure of soil to the elements. Mr. Agbu testified that the silt fence at the property was down in certain areas and that a pile of dirt was uncovered because Respondents were in the process of backfilling the area around the foundation. When Mr. Fields visited the property on October 31, however, no backfilling was taking place. Mr. Agbu's explanation was that the backfilling contractor did not work continuously and that he would remove the backfilling equipment from the site whenever he left, even for lunch. When questioned further, he was equivocal about whether any backfilling occurred on October 31, stating only that such activity was occurring around that time. Based on Mr. Agbu's demeanor, I do not find credible his original testimony that backfilling was occurring on the date of the violations, but the equipment fortuitously was absent from the site when Mr. Fields was there. Instead, I find that no backfilling occurred on the date of the infractions. It is undisputed that the silt fence was not constructed in accordance with the approved erosion and sedimentation plan for the site and that there was no stabilized construction entrance as required by that plan. It also is undisputed that the pile of dirt intended for use as backfill was not covered in any way.

Mr. Agbu stated that Respondents did not respond to the first Notice of Infraction because they never received it, but that they responded promptly upon receipt of the default order, which contained a copy of the Notice of Infraction. The Government served the first

Notice of Infraction upon Respondents by certified mail, return receipt requested, addressed to Respondents at 6204 Breezewood Drive, # 202, Greenbelt, Maryland 20770. Respondents concede that this is their correct business address. The Postal Service returned that mailing to the Government marked "Unclaimed." PX 108. The envelope indicates that the Postal Service gave Respondents notice of the certified letter on November 23, 2001 and December 8, 2001, but Respondents never claimed it. *Id.* The Postal Service returned it to the Government on December 17, 2001. *Id.* This evidence demonstrates that Respondents did not receive the first Notice of Infraction because they did not claim it after receiving two notices that the Postal Service was holding a certified letter for them.

III. Conclusions of Law

The first rule at issue is 21 DCMR 502.1, which provides:

> No person may engage in any land disturbing activity on any property within the District unless that person has secured a building permit from the District. Approval of a building permit shall be conditioned upon submission by the permit applicant of an erosion and sedimentation plan which has been reviewed and approved by the Department.

Section 502.1 requires any activity that meets the definition of "land disturbing activity" to be authorized by a building permit. It is undisputed that, by October 31, 2001, Respondents had obtained a building permit authorizing construction of a single-family home at 826 48th Place, N.E., and the Government does not argue that any additional permit was necessary to authorize the land disturbing activities that were taking place on that date. Instead, the Government's theory is that Respondents should have obtained a separate permit authorizing the demolition of a building that previously stood at the property. "[D]emolition of buildings or structures" is included within the definition of "land disturbing activities" for which a building permit is required, 21 DCMR 599.1, and a permit to construct a new building does not

necessarily authorize demolition of an existing building. *Cf. DOH v. Washington General Contractors,* OAH No. I-00-10387 at 6 (Final Order, July 11, 2001) (permit authorizing only demolition of an existing structure does not authorize the additional land disturbing activity associated with new construction at the same site). The demolition at issue here, however, occurred several months before October 31, 2001, the date of infraction identified on the Notice of Infraction. Because there was no evidence that any demolition occurred on October 31, the Government failed to meet its burden of proving that Respondents needed an additional permit to conduct land disturbing activities on that date. Therefore, it did not prove that Respondents violated § 502.1 as charged in the Notices of Infraction, and that charge must be dismissed. D.C. Official Code § 2-1802.03(c).

Respondents' plea of Admit with Explanation establishes that they violated: 21 DCMR 506.2 by not complying with an approved erosion and sedimentation plan; 21 DCMR 538.1(f) by failing to protect stockpiled soil with mulch or temporary vegetation; and 21 DCMR 539.4 by failing to have adequate erosion control measures in place during exposure of soil to the elements. Each violation is a Class 3 infraction, punishable by a $100 fine for a first offense. 16 DCMR 3201; 3234.2(c); 3234.2(r); 3234.2(y). As noted above, Respondents' explanation that the necessary erosion controls were not in place due to backfilling operations on the day of the violations is not credible because no backfilling occurred on that day. Consequently, the erosion controls required by the approved plan and by the regulations should have been in place to avoid erosion of the soil from the site. Respondents' explanation, therefore, provides no basis for mitigating the fines, and I will impose the full $100 fine for each of the three violations.

The Civil Infractions Act, D.C. Official Code §§ 2-1802.02(f) and 2-1802.05, requires a Respondent to demonstrate "good cause" for failing to answer a Notice of Infraction within 20

days of the date of service by mail. If the Respondent does not make such a showing, the statute requires that a penalty equal to the amount of the proposed fine must be imposed. D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). A party's non-receipt of a Notice of Infraction due to its failure to claim a certified letter after receiving notice of the letter from the Postal Service does not constitute good cause for failing to answer. *DOH v. Johns,* OAH No, I-00-60103 at 5 (Final Order, January 31, 2002); *Malone v. Robinson*, 614 A.2d 33, 38 n.9 (D.C. 1992). Respondents, therefore, have not established good cause for failing to answer the Notice of Infraction and must pay the statutory penalty.

The amount of the statutory penalty "does not depend upon whether the Government has established the underlying violations." *DOH v. Washington General Contractors, supra,* at 11. The Council's purpose in enacting the penalty provisions of the Civil Infractions Act was to promote an efficient adjudication system by encouraging prompt responses to Notices of Infraction, regardless of whether the Respondent believes there is a valid defense. *DOH v. DRM & Assoc./Tender Love Child Development Center*, OAH No. I-00-40309 at 14 (Final Order, January 23, 2002). Thus, Respondents must pay a penalty equal to the total fines sought in the first Notice of Infraction, which amount to $800 – $300 for the §§ 506.2, 538.1(f) and 539.4 violations and $500 for the alleged § 502.1 violation. *See* 16 DCMR 3234.1(a). Added to the $300 in fines, the total owed by Respondents is $1,100.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2003:

ORDERED, that Respondents are **NOT LIABLE** for violating 21 DCMR 502.1 as alleged in the Notices of Infraction; and it is further

ORDERED, that Respondents are **LIABLE** for violating 21 DCMR 506.2, 538.1(f) and 539.4 as alleged in the Notices of Infraction and are also **LIABLE** for the penalty required by D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f) for their failure to answer the first Notice of Infraction within 20 days of service; and it is further

ORDERED, that Respondents, who are jointly and severally liable, shall pay a total of **ONE THOUSAND ONE HUNDRED DOLLARS ($1,100)** in accordance with the attached instructions within 20 calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondents fail to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting from the date of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondents

pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondents' business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

/s/ 02/11/03

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John P. Dean
Administrative Judge